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No: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSEPH A. BARNES, LUCILLE N. BARNES, CLARENCE H. BERG, PETER J. NEMEC, and AGNES C. NEMEC, Petitioners,

v.

DONALD P. HODEL*, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; and THE BUREAU OF LAND MANAGEMENT, OREGON STATE OFFICE; Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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*Donald P. Hodel has been substituted for William P. Clark as Respondent in the appeal below pursuant to Fed.R.App.P. 43(c)(1)

30 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the final decision of a hearings officer in a contested administrative proceeding is governed by the principles of res judicata with respect to issues decided in that proceeding once the time for appeal has lapsed and no appeal is taken.

2. Whether the United States may rely upon the provisions of a repealed statute as authority for the reservation of surface rights on mineral land subsequently patented.

3. Whether the United States is bound by the decision rendered by the District Court in United States v. Oregon & C. R.R. Co., 8 F.2d 645 (D.C. Or. 1925), in which case the question of the application of the mineral exception in the grant to the railroad was considered and determined.

PARTIES TO THE PROCEEDINGS

The case caption includes all parties to this proceeding. It should, however, be noted that Donald P. Hodel's name in the case caption is followed by an asterisk. This indicates that Donald P. Hodel was substituted for William P. Clark in the appeal below pursuant to Fed. R. App. P. 43 (c)(1).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT OF APPEALS CASES:

COURT OF APPEALS CASES CONTINUED:

DEPARTMENT OF THE INTERIOR OPINIONS:

STATUTES:

STATUTES CONTINUED:

TREATISES AND OTHER AUTHORITIES:

Petitioners Joseph A. Barnes, Lucille N. Barnes, Clarence H. Berg, Peter J. Nemec and Agnes C. Nemec, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 9, 1987.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The judgment of the trial court filed March 31, 1986, the order of the trial court filed March 27, 1986, and the the Magistrate's Findings and Recommendations filed August 29, 1985 appear in the Appendix hereto. Also included in the Appendix are the decisions of the Board of Land Appeals of the Department of the Interior entered on December 13, 1983 and the Hearings Officer's Decision in Contest No. Oregon 01453-A entered on September 13, 1966.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 9, 1987. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The O & C grant acts: the Act of July 25, 1866 (14 Stat. 239); the Act of April 10, 1869 (16 Stat. 47); and the Act of May 4, 1870 (16 Stat. 94).

2. The Revestment Act of June 9, 1916 (39 Stat. 218).

3. The Sustained Yield Act of August 28, 1937 (50 Stat. 874).

4. The Act to Reopen the O & C land to mineral entry of April 8, 1948 (62 Stat. 162).

5. United States Code, Title 30 §§ 601 to 615 (the Act of July 23, 1955).

§ 615. Limitation of Existing Rights.

"Nothing in this Act shall be construed in any manner to limit or restrict or to authorize the limitation or restriction of any existing rights of any claimant under any valid mining claim heretofore located, except as such rights may be limited or restricted as a result of a proceeding pursuant to section 5 of this Act[30 U.S.C. § 613] or as a result of a waiver and relinquishment pursuant to section 6 of this Act [30 U.S.C. § 614]; and nothing in this Act shall be construed in any manner to authorize inclusion in any patent hereafter issued under the mining laws of the United States for any mining claim heretofore or hereafter located, or any reservation not otherwise authorized by law, or to limit or repeal any existing authority to include any reservation, limitation or restriction in any such patent, or to limit or restrict any use of the lands covered by any patented or unpatented mining claim by the United States, its lessees, permittees, and licensees which is otherwise authorized by law. (July 23, 1955, ch. 375 § 7, 69 Stat. 372)."

STATEMENT OF THE CASE

A. PRESENT PROCEEDINGS

On June 15, 1983, the Bureau of Land Management issued Mineral Patent No. 36-83-0013 to Petitioners. The Patent conveyed fee simple title to 114.22 acres of land and was issued subject to the following

contested timber rights:

> "2. Under authority of section 3 of the Act of June 9, 1916 (39 Stat. 218),the timber now on lots 9, 15, 18, and 22 of the described land, ...
>
> "3. The timber now or hereafter growing on that 20 acre portion of the High Bar Association placer claim covering the Oro Grande Placer Mining Claim located July 19, 1938, ... subject to the provisions of April 8, 1948 (62 Stat. 162); ..."

Petitioners protested against the form in which BLM issued the patent, claiming that they have a vested right to the surface resources. BLM denied the protest by decision dated August 17, 1983. Petitioners appealed that decision to the Interior Board of Land Appeals in Arlington, Virginia. The Board affirmed the BLM decision in its Decision No. IBLA 83-992 on December 13, 1983. A Petition for Writ of Review and Alternate Writ of Mandamus was filed in the District Court for the District of Oregon. Both parties filed summary judgment motions which were heard by Magistrate Hogan. He recommended summary judgment against the

Petitioners. After a judicial review of Magistrate Hogan's Findings and Recommendations, the District Court entered summary judgment for the United States and a judgment dismissing Plaintiffs' amended petition. Petitioners then appealed to the Court of Appeals for the Ninth Circuit which entered its opinion affirming the trial court on June 9, 1987.

B. ADMINISTRATIVE PROCEEDINGS

Petitioners contend that the United States is estopped to deny the claimants' rights to surface resources by the final decision of the hearing examiner as entered September 13, 1966 in Contest No. Oregon 014538-A undertaken pursuant to section 5 of the Act of July 23, 1955 (30 U.S.C. § 613).

BLM instituted such proceedings in 1964. Petitioners and their predecessors in interest submitted a verified statement asserting that they claimed right, title,

and interest in the vegetative surface resources and other surface resources, which were contrary to and in conflict with the limitations and restrictions specified in section 4, 30 U.S.C. § 612. Petitioners prevailed in the proceeding and the final decision recognizing and accepting the Petitioners claims was entered on September 13, 1966.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decisions of this Court regarding the application of the collateral estoppel aspect of res judicata and further conflicts with the decisions of this Court regarding the effect to be given a repealed statute.

A. COLLATERAL ESTOPPEL

Unless otherwise excluded by law, a patent entered on a mineral claim conveys fee simple title to all the land, including the surface resources. Delmonte M. & M. Co. v. Last Chance M. & M. Co., 171 U.S. 55, 18

S.Ct. 895, 43 L.Ed. 176 (1898).

The timber rights contested in this case were reserved to the United States under authority of section 3 of the Act of June 9, 1916 (39 Stat. 218) and under the provisions of the Act of April 8, 1948 (62 Stat. 162). One of Petitioners' claims was filed on June 3, 1916 and was relocated on July 19, 1938. The other four claims were located after June 9, 1916 and prior to August 28, 1937.

The original grant by Congress to the O & C Railroad reserved to the United States all mineral lands from those granted. Section 19, the section within which all of Petitioners' claims are located, was patented to the O & C Railroad in 1895. Prior to that date, five mineral claims were located in Section 19.

The Revestment Act (39 Stat. 218) provided for a proceeding to be brought by the United States Attorney to finally determine

the remaining issues between the United States and the railroad. An opinion was entered by the court on September 14, 1925. See, United States v. Oregon and California R.R. Co., supra. In the opinion and final decree, the court ruled that almost two million acres of the lands granted did not originally pass to the O & C Railroad because of the mineral character of the land. In that decision, the court quieted title to all land within the grant, including that which had been patented and that which remained unpatented. The decision does not specifically set out descriptions of the various classes of land. The Petitioners contended that Section 19 was among those two million acres which did not originally pass to the railroad and, as such, was not within the provisions of the Revestment Act of June 9, 1916 (39 Stat. 218). The court below determined that the Petitioners' claim failed for want of proof, even though

the court below acknowledged the five mineral claims in Section 19 which were filed prior to patenting of the land to the railroad. These claims are certainly compelling evidence that Section 19 was within the acres excluded by the 1925 decision and the 1926 decree of Judge Wolverton. The land was then believed to be mineral in character, and was, on two subsequent occasions, found to be mineral land: in the 1966 proceeding and again at the time of issuing the patent to Petitioners.

The interpretation to be given the decision of the Oregon trial court was before the Court of Appeals for the District of Columbia in Clackamas Co.,Ore. v. McKay, 219 F.2d 479 (D.C. Or. 1954). There, the court held:

> "The action in the District Court of Oregon was brought by the United States. Having thus consented, it was a party, and it and all its agents were bound by the courts decision. We think, and hold, that the Secretary of Agriculture and all other government officers were and are bound to recognize

and abide by that court's findings." Id. at 496.

B. 1966 ADMINISTRATIVE PROCEEDING

The provisions of 30 U.S.C. § 612 provide that any mining claim "hereafter located" shall not be used prior to the issuance of patent for purposes other than mining and reserves to the United States the management and disposition of surface resources on such claims. Section 613 establishes a procedure for determining whether mining claims located prior to the date of the Act of July 23, 1955 (69 Stat. 368) would be subject to the provisions of section 612. It provides that the head of the federal agency responsible for administering the surface resources for the land of the United States may institute proceedings leading to a determination of surface rights. A mining claimant asserting a right to the surface resources must then file a verified statement. If the verified statement is filed, the Secretary of the Interior must then

schedule a hearing to determine the validity and effectiveness of any right, title, or interest in the mining claim asserted by the claimant. BLM instituted such proceedings in 1964. Petitioners and their predecessors in interest presented a verified statement. That statement asserted that they claimed right, title, and interest in the vegetative surface resources which are contrary to, and in conflict with, the restrictions specified in section 4 (69 Stat. 368). A notice of hearing issued on June 22, 1966. That notice stated:

> 2. Nature of the Proceedings. The hearing will be held for the purpose of receiving oral testimony under oath and documentary evidence, bearing upon any and all material issues in the above entitled matter.

Subsequently, BLM recognized and accepted the Petitioners' claims and so informed the hearing examiner. In his final decision, the hearing examiner recited:

> On August 18, 1966, the Land Office, Bureau of Land Management, Portland, Oregon, advised that it has accepted

> the rights claimed and asserted by the mining claimants and requested that the hearing be cancelled.
>
> Since the Bureau of Land Management has recognized and accepted the rights claimed and asserted by the mining claimants, a hearing pursuant to section 5(c) of the Act of July 23, 1955, (69 Stat. 369) will not be held as to the above identified and described unpatented mining claims.

The final decisions of a hearing examiner in an administrative adjudicatory proceeding is governed by res judicata and collateral estoppel principles. Atlantic Refining Co. v. Federal Trade Com.,381 U.S. 357, 85 S.Ct. 1498, 14 L.Ed.2d 443 (1965). An order of an administrative agency finally determines the rights of the parties before it subject to judicial review of the order. Columbia Broadcasting System,Inc. v. United States, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942). An administrative decision of an adjudicatory character binds the parties to the proceedings and is res judicata, thereby precluding a subsequent judicial proceeding between the parties regarding

the matters litigated in the administrative action. International Union of Mine, Mill & Smelter Workers v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335, 65 S.Ct. 116, 89 L.Ed. 1649 (1945); Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 61 S.Ct. 908, 85 L.Ed. 1251 (1941), reh. denied, 313 U.S. 599, 61 S.Ct. 1093, 85 L.Ed. 1551 (1941).

The issue before this Court is precisely the same issue that was before the hearings officer in the 1966 administrative proceedings, i.e. Petitioners' claims to the surface resources of the land.

Res judicata provides that when a court of competent jurisdiction has entered a valid final judgment the parties to the suit and their privies are thereafter bound, not only as to every matter that was offered and received to sustain or defeat the claim or demand, but also as to any other admissable matter which might have been offered for that purpose. Commissioner v. Sunnen,

333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948), conformed to, 168 F.2d 839 (1948). The doctrine of res judicata precludes a party from splitting his cause of action so as to make several actions with respect to claims then capable of recovery in the first action. Mendez v. Bowie, 118 F.2d 435 (1st Cir. Puerto Rico 1941), cert. denied, 314 U.S. 639, 62 S.Ct. 76, 86 L.Ed. 513 (1941).

The court below believed that the language of 30 U.S.C. § 615 permitted the United States to relitigate the matters which were litigated in 1966 in the 1983 proceedings to patent the land.

The finality to be given to final decisions in adjudicatory administrative proceedings is an important legal issue which extends far beyond the confines of this case. Such final decisions have been determined by this Court to be governed by res judicata and collateral estoppel principles. Atlantic Refining Co. v. Federal

Trade Com., supra.

Congress has not repealed the principles of res judicata. In the 1955 Act (30 U.S.C. 601, et seq.), it provided for a determination to be made, in the proceedings enacted there, which would quiet title to surface resources on claims in which the claimant asserted rights adverse to the United States. The proceeding contemplated by the Act may be interpreted consistently with ruling principles of law, including that of res judicata, by requiring that section 615 compelled the United States to assert its rights in the section 613 proceeding if it wanted to preserve them.

C. REPEALED STATUTE

The Act of August 28, 1937, commonly known as the "Sustained Yield Act," is codified beginning at 43 U.S.C. § 1181a. It states in material part:

> "Notwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218),

> and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands, and powersite lands valuable for timber, shall be managed, except as provided in section 3 hereof [40 U.S.C. § 1181(c)], for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [principle] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities..."

The final provision of the Act, denoted Title II, § 201(c) (50 Stat. 876), provided:

> "All Acts or parts of Acts in conflict with this Act (citation omitted) are hereby repealed to the extent necessary to give full force and effect to this Act."

A statute providing for the repeal of all inconsistent laws is effective to accomplish such repeal. 82 C.J.S., Statutes, § 285.

The Department of the Interior con-

sidered the effect of this repealer in its opinion of August 25, 1941 entitled "APPLICABILITY OF MINING LAWS TO REVESTED OREGON AND CALIFORNIA AND RECONVEYED COOS BAY GRANT LANDS," 57 I.D. 365. For the reasons stated in that opinion, the Department concluded that section 3 of the Act of June 9, 1916 was repugnant to and inconsistent with the Act of August 28, 1937, and was therefore repealed by the same.

The opinion states:

> "The Act of 1937 expressly repealed all acts, and particularly any part or parts of the acts of June 9, 1916, and February 26, 1919, inconsistent with its provisions. ... The express notice taken in the act of 1937 of the act of 1916, including section 3 of the latter, plainly indicates an intention to abrogate it to the extent it is inconsistent with the act of 1937, ... the intention being clearly expressed in the act itself." Id. at 373.

The conclusion of the Department was:

> "As the law now stands, it is the conclusion of the Department that section 3 of the act of June 9, 1916, is clearly irreconcilable and in conflict with section 1 of the act of August 28, 1937, and the mineral land laws are no longer applicable to the lands classified

under that section: ..." Id. at 374.

Once repealed, the act is of no force and effect and must be considered as if it never existed. In Ex parte McCardel, 7 Wall. 506, 19 L.Ed. 265 (1869), this Court stated:

> "On the other hand, the general rule, supported by the best elementary writers (Dwarris, Stat. 538), is that 'when an Act of the Legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed.'" Id. at 265

This rule has been consistently followed. Gustafson v. Rajkovich, 263 P.2d 540, 40 A.L.R. 2d. 520 (Ariz. 1953); Woolsey v. Lassen, 371 P.2d 587 (Ariz. 1962).

The affect of the repeal is "to obliterate the Act as if it never existed," In Interest of Weinstein, 386 N.E.2d 593 (Ill. 1979); it is "deemed never to have existed," Matter of Hoover's Estate, 251 N.W.2d 529 (Iowa 1977); the "repeal of the statutes had the effect of blotting them out completely as if they never existed, and stripped the courts of jurisdiction created by the void-

ed laws." Harkey v. Mobley, 552 S.W.2d 79 (Mo. 1977). See also, Chesapeake & Potomac Co. of West Virginia v. State Tax Dept.,339 S.E.2d 918 (W. Va. 1977).

When, in 1948, Congress again considered the question of the application of mineral laws of the United States to the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands, it recognized that section 3 of the Act of June 9, 1916 had been repealed. The Act of April 8, 1948 (62 Stat. § 162) is stated to be: "an Act to reopen the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road land grants to exploration, location, entry and disposition under the general mining laws." [Emphasis added]. This language could only be consistent with the view that section 3 of the Act of June 9, 1916 had previously been repealed by Congress. In the 1948 Act, Congress made no reference to the Act of June 9, 1916,

although it does specify the Acts of August 28, 1937 and "any other act relating to the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands, as affected by the 1948 Act."

The court below held that the second proviso of the first paragraph of the 1948 Act is a recognition by Congress that section 3 of the Act of June 9, 1916 was then subsisting. That proviso reads: "That locations made prior to August 28, 1937, may be perfected in accordance with the laws under which initiated.

Where an act is repealed by a later act, a subsequent recognition of the earlier act by the lawmaking body as a law still subsisting does not operate to prevent such repeal. District of Columbia v. Hutton, 143 U.S. 18, 12 S.Ct. 369, 36 L.Ed. 60 (1892). There, this Court stated:

> "It is contended, however, that by the act of January 31, 1883, (22 St. 412; Supp. Rev. St., 2d Ed., 397) congress recognized said section 354 as a still

> subsisting law, and that consideration should compel a reversal of the judgment below. We are not impressed with this contention. ..." Id. at 372

The Court held:

> "It is manifest, however, from an inspection of this section, that there was no recognition in it by congress that said section 354 was still subsisting law. But even if congress had supposed that that section was still the law, when, as a matter of fact it had been repealed, it would make no difference in this consideration, [citations omitted]. The question is was said section 354 repealed by the Act of 1878? That is a judicial question to be determined by the courts, upon proper construction of that section and subsequent legislation upon the same subject-matter, and is not for the legislative branch of the government to determine." Id. at 372.

Section 3 of the Act of June 9, 1916 is the statute relied upon by the BLM to authorize a restriction in the patent. That section was repealed by the Act of August 28, 1937. It did not exist in 1948. It did not exist in 1983. It cannot serve as authority for a timber reservation.

The reference in the second proviso of the 1948 Act could only have been to the

general mining laws of the United States enacted in 1872 and codified in 30 U.S.C. § 1, et seq. That is the only law which existed in 1948 and prior thereto under which the claims in issue were initiated.

The question of the effect to be given a repealed statute is an important principle of law and extends far beyond this case. This Court has not addressed the issue since Exparte McCardle, supra, in 1869. The court below apparently believed that decision lacked continuing vitality, for it did not follow the rule announced in that case. It decided this case to the contrary. The court below did not apply the law as set forth by this Court in District of Columbia v. Hutton, supra.

CONCLUSION

The decision below raises significant and recurring problems concerning the application of the principles of res judicata to final decisions in administrative proceed-

ings and regarding the legal effect to be given repealed statutes. Its decision conflicts with the decisions of this Court mentioned above. These conflicts justify the grant of certiorari to review the judgment below. For these reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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